

are party defendants to the suit, and if the same title is reasserted and made good, as here in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title-claimant has or has not been in possession within twelve years; unless the opponent can defeat the title by adverse possession. There is no such defeat in this case.

Therefore I am of opinion that the appeal must succeed.

*Appeal allowed.*

R. R.

1910.

VASUDEO  
ATMARAM  
JOSHI  
v.  
EKNATH  
BALKRISHNA  
THITE.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

\* DAGDU VALAD SADU (ORIGINAL DEFENDANT), APPELLANT, v. NANA VALAD SALU (ORIGINAL PLAINTIFF), RESPONDENT.\*

1910.

August 25.

*Evidence Act (I of 1872), section 92, proviso 1—Sale-deed—Contemporaneous agreement—Admissibility—Fraud.*

A desired to set aside an ostensible sale-deed by proving that a representation, agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale-deed.

*Held*, no evidence of such a representation, agreement or promise could be admitted for this purpose.

*Dattoo v. Ramchandra*(1) and *Keshavrao v. Raya*(2) followed.

SECOND appeal from the decision of B. C. Kennedy, District Judge of Nasik, confirming the decree of B. K. Bal, Subordinate Judge of Sinnar.

The properties in suit originally belonged to one Dagdu valad Lakshman Sonavai. They were put up to auction sale in execution of a decree against him and were purchased by the plaintiff who sold them to the defendant on the 25th September 1901.

In the year 1907 the plaintiff brought the present suit for a declaration that the sale-deed passed by him to the defendant

\* Second Appeal No. 797 of 1909.

(1) (1905) 20 Bom. 119.

(2) (1906) 8 Bom. L. R. 287.

1910.

DAGDU  
VALAD SADU  
v.  
NANA  
VALAD SALU.

was in reality a mortgage and for the redemption of the properties under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

The defendant contended that the properties belonged to him and not to the plaintiff, that the plaintiff knowingly passed the sale-deed without any deception on the defendant's part, and that at the auction sale the property was purchased by the plaintiff for and on behalf of the defendant.

The Subordinate Judge raised six issues in all, and out of them issues Nos. 1 and 2 were as follows :—

1. Whether plaintiff proves any invalidating circumstances such as fraud, misrepresentations, &c., which would entitle him to prove that the apparent nature of the deed and of the transaction is not the real one and that the transaction was in reality a mortgage and that he meant to execute a mortgage-deed only?

2. If so, whether the transaction is in reality a mortgage? Whether plaintiff intended to and did execute a mortgage-deed only as the plaintiff alleges? Or whether plaintiff had really purchased the property bonami for the defendant as he contends?

The findings on the said issues were in the affirmative with the following addition to the finding on issue No. 2:—"Plaintiff knowingly executed a sale-deed, only in form however." On the said findings the Subordinate Judge made a declaration that the transaction was a mortgage, and ordered redemption under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879).

On appeal, the first out of the two issues raised was :—

Did the defendant at the time of the execution of the sale-deed represent to the plaintiff that the sale-deed would not be enforced as such, but that the sale-price would be treated as a loan or mortgage?

The District Judge found on the said issue in the affirmative and confirmed the decree.

*R. R. Desai* for the appellant (defendant):—

The plaintiff did not set up a contract of re-sale and did not sue on that ground. He alleged that the transaction in suit, though in the form of a sale, was in reality a mortgage. The lower Courts allowed evidence in support of the plaintiff's

contention that there was a contemporaneous agreement to treat the sale as a mortgage. Such evidence was not admissible: *Balkishen Das v. W. F. Legge*<sup>(1)</sup>; *Dattoo v. Ramchandra*<sup>(2)</sup>; *Keshavrao v. Raja*<sup>(3)</sup>.

*G. K. Dandekar* for the respondent (plaintiff):—

The cases relied on have no application. The present case falls under proviso I of section 92 of the Evidence Act. Fraud was alleged on the part of the defendant, and it was proved: *Navalbai v. Sivubai*<sup>(4)</sup>; *Krishnabai v. Rama*<sup>(5)</sup>; *Sangira v. Ramappa*<sup>(6)</sup>. Both the lower Courts have found as a fact that there was promise by the defendant that the transaction would be treated as a mortgage. Under section 17 (3) of the Contract Act a promise made without any intention of fulfilling it is a fraud. Thus we were entitled to lead evidence to prove fraud on the part of the defendant. A party's intention at the time of the contract can be gathered from his subsequent conduct. On this point no specific issue was raised in the lower Courts, therefore an issue may be sent down.

SCOTT, C. J.:—The learned Judge, for the reasons stated in the Appendix to his judgment, is of opinion that a person who wishes to set aside an ostensible sale-deed can do so on proving that a representation was made to him at the time of execution that it would not be enforced as a sale-deed, and he accordingly states as the first question which arises for decision in the appeal before him:—"Did the defendant at the time of the execution of the sale-deed represent to the plaintiff that the sale-deed would not be enforced as such?" In other words, did the defendant promise to the plaintiff that the sale-deed would not be enforced as such? Stated in this form the question propounded by the learned Judge is whether or not there was a contemporaneous agreement between the parties inconsistent with the written document executed by them.

We think it is clear upon the authorities binding upon us that no evidence of such an agreement or promise or representation

(1) (1899) 22 All. 149.

(2) (1905) 30 Bom. 119.

(3) (1906) 8 Bom. L. R. 237.

(4) (1903) 8 Bom. L. R. 761.

(5) (1906) 8 Bom. L. R. 764.

(6) (1909) 34 Bom. 59.

1910.

DAGDU  
VALAD SADU  
v.  
NANA  
VALAD SALU.

can be admitted. The Court's view of the law expressed in *Balkishen Das v. W. F. Legge*<sup>(1)</sup> was acted upon in *Daltoo v. Ramchandra*<sup>(2)</sup> and again in *Keshavrao v. Raya*<sup>(3)</sup> and in *Achuta-ramaraju v. Subbaraju*<sup>(4)</sup>.

Mr. Justice Batty in *Keshavrao v. Raya*<sup>(3)</sup> said "...the fraud which under proviso I, section 92, may be proved, must be fraud which would invalidate a document, and therefore subsequent fraud in respect of the document not such as to invalidate it could not be a ground for admitting extraneous oral evidence under proviso I of section 92. The real effect of admitting such evidence would not be to prove fraud in the execution of the document, but the existence of a different intention than that which appears on the document itself. In other words, it would be an attempt to prove a different contract from that expressed in the document without proving any fraud in the preparation of the document which would invalidate it."

The learned pleader for the respondent in order to escape from this decision has contended that the representation or promise which the learned District Judge held in this case to be proved amounted to fraud as defined by section 17 (3) of the Contract Act where it is said that fraud means and includes a promise made without any intention of performing it.

There is in this case, however, no finding that the defendant at the time of making the promise had no intention of performing it. He may have made the promise in good faith and changed his mind afterwards when he found the value of the property in dispute had increased and that it was more advantageous for him to rely upon the sale evidenced by the written document than upon the mortgage which, the plaintiff alleges, was the real agreement between the parties.

We hold that the document executed by the plaintiff must be treated, as it appears on its face to be, as a sale-deed and not as a mortgage.

(1) (1899) 22 All. 149.

(3) (1906) 8 Bom. L. R. 287.

(2) (1905) 30 Bom. 119.

(4) (1901) 25 Mad. 7.

We, therefore, reverse the decree of the lower Court and dismiss the suit with costs throughout on the plaintiff.

*Decree reversed and suit dismissed.*

G. B. R.

1910.

DAGDU  
VALAD SADU  
v.  
NANA  
VALAD SALU.

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

THE TALUKDARI SETTLEMENT OFFICER (ORIGINAL PETITIONER),  
APPELLANT, v. CHHAGANLAL DWARKADAS (ORIGINAL OPPONENT),  
RESPONDENT.\*

1910.

July 28.

*Gujerath Talukdars' Act (Bom. Act VI of 1888), section 31<sup>(1)</sup>—Land Revenue Code (Bom. Act V of 1889)—Talukdari tenure—Wanta lands (at Sarsa)—Alienated land—Attachment of income.*

Wanta lands are lands held by Rajputs or the representatives of Rajputs who, after the Mahomedan conquest of Gujerath, received one-fourth of the land of certain villages on condition of keeping order in those villages. The lands were held either rent-free or at a small quit-rent.

\* First Appeal No. 189 of 1909.

(1) Section 31 of the Gujerath Talukdars' Act (Bom. Act VI of 1888) as amended by Bombay Act II of 1905 is as follows:—

31. (1) No incumbrance on a Talukdar's estate, or on any portion thereof made by the Talukdar after this Act comes into force, shall be valid as to any time beyond such Talukdar's natural life, unless such incumbrance is made with the previous written consent of the Talukdari Settlement Officer or of some other officer appointed by the Governor in Council in this behalf, and after the death of a Talukdar no proceeding for the attachment, sale or delivery of, or any other process affecting the possession or ownership of, a Talukdari estate, or any portion thereof, in execution of any decree obtained against such Talukdar or his legal representative, except a decree obtained in respect of an incumbrance made with such consent as aforesaid, or made before this Act comes into force, shall be instituted or continued except with the like consent.

(2) No alienation of a Talukdar's estate or any portion thereof, or of any share or interest therein, made after this Act comes into force, shall be valid, unless such alienation is made with the previous sanction of the Governor in Council which sanction shall not be given except upon the condition that the entire responsibility for the portion of the jama and of the village expenses and police charges due in respect of the alienated area, shall thenceforward vest in the alienee and not in the Talukdar.